Supreme Court, U.S.
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IN THE

Supreme Court of the United States

YSLETA DEL SUR PUEBLO,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the States, by adopting the Fourteenth Amendment, waive their Eleventh Amendment immunity by consenting under the "plan of Convention" to suits based on the takings clause of the Fifth Amendment?

IN THE

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No. _____

YSLETA DEL SUR PUEBLO,

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STATE OF TEXAS,

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PETITION FOR WRIT OF CERTIORARI

Comes now Ysleta del Sur Pueblo, a federally recognized Indian tribe, seeking certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The opinion of the Fifth Circuit was entered on January 6, 2000, Appendix at 5a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

OPINIONS BELOW

Neither the Order of the United States District Court for the Western District of Texas dismissing the case on jurisdictional grounds, nor the opinion of the Court of Appeals for the Fifth Circuit affirming dismissal, Appendix at 5a, are reported.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V: [No] Private property shall be taken for public use, without just compensation.

U.S. Const. amend. XI: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by another State, or by Citizens or Subjects of a Foreign State.

U.S. Const. amend. XIV § 1: [No] State [shall] deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT OF THE CASE

The Pueblo seeks a money judgment against the State of Texas for a Fifth Amendment taking by the State of the Pueblo's lands at a time subsequent to the adoption of the Fourteenth Amendment. The Pueblo argued that the remedy provided by the Constitution for a Fifth Amendment taking is self-executing, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 n. 9 (1987); that sovereign immunity is no bar to an action for damages brought under the takings clause of the Fifth Amendment, *United States v. Testan*, 424 U.S. 392, 400-401 (1976); and that the Fourteenth Amendment incorporates the Fifth Amendment's taking clause and applies it against the States, *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). The Court of Appeals for the Fifth Circuit affirmed

the district court's dismissal of the case based on the Eleventh Amendment.

ARGUMENT

This is a property rights case. Federalism is implicated only to this extent: has Eleventh Amendment jurisprudence evolved to the point that the takings clause of the Fifth Amendment is no longer applicable to States? Has this Court, in effect, granted States a license to retain property regardless of the manner in which it was acquired, with no duty to provide compensation for a public taking? *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 696 (1982).

The decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), established modern Eleventh Amendment jurisprudence by refusing to construe the amendment in a literal fashion and, out of deference for state sovereignty, extending its prohibition to a suit for the specific performance of a contract brought against a state by its own citizen. In the same opinion, however, the Supreme Court addressed the issue that has constantly bedeviled application of the Eleventh Amendment bar: what to do with thieving States. The Court added an important caveat to its decision:

> While a state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

Hans, at 20-21. Until recently, *Ex parte Young* officer-suits were used to judicially resist such deprivation of property

rights.[1] Several Courts of Appeals have held that the Eleventh Amendment bars officer-suits to recover by characterizing the requested relief as retroactive, not prospective.

In *Ysleta del Sur Pueblo v. Laney*, 199 F.3d 281 (5th Cir. 2000), the Pueblo brought an officer-suit to recover real property based on the same factual allegations that form its Fifth Amendment taking claim in this action. The Court, characterizing the relief as retroactive, held that the Eleventh Amendment barred the suit.[2] See also *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667, 672 (5th Cir.), cert. denied, 513 U.S. 1016 (1994); *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989); *Toledo, Peoria & Western R.R. v. Illinois Department of Transportation*, 744 F.2d 1296 (7th Cir. 1994), cert. denied, 470 U.S. 1051 (1985). This Court held *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) that the Eleventh Amendment barred those officer-suits to recover real property which implicate special sovereignty issues.

In the absence of an officer-suit to recover property taken by the State in violation of the takings clause of the Fifth Amendment, the Pueblo is denied all relief for this serious violation of its Constitutional rights unless it can bring this action for a money judgment against the State. Several federal decisions indicate that the Eleventh Amendment bars such an action. In every case, however, the courts possessed some assurance that no such taking occurred. In *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667, 668 (5th Cir.), cert. denied, 513 U.S. 1016 (1994), the

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[1] Officer-suits cannot be used to compel a state to perform its contracts. See *North Carolina v. Temple*, 134 U.S. 22 (1890) (decided the same day as *Hans*).

[2] The *Laney* case is subject to a petition for certiorari filed contemporaneously with this petition.

district court remanded plaintiff's claims under state common law and the Texas Constitution. The availability of a suit for compensation defeats a Fifth Amendment takings claim. See *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 703 n. 27 (1949). The court stated in *McMurtray v. Holladay*, 11 F.3d 499, 504 (5th Cir. 1993), "we do not conclude" that the state act in question constituted a Fifth Amendment taking. In *Harrison v. Hickel*, 6 F.3d 1347, 1353 (9th Cir. 1993), the court noted that plaintiffs have not demonstrated that they do not have a suitable forum for their takings claim. In *Robinson v. Georgia Department of Transportation*, 966 F.2d 637 (11th Cir. 1992), the court cited two state court proceedings involving the plaintiffs which respectively held (1) plaintiffs could not appeal a condemnation award to others where they failed to intervene in the condemnation proceeding of which they had notice, and (2) statute of limitations barred takings claim in state court. In *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990), the court dismissed all takings claims as unripe; the court held that the Eleventh Amendment barred the plaintiff's other claims against the state. The same occurred in *Suarez-Cestero v. Pagan-Rosa*, 996 F. Supp. 133, 141 (D P.R. 1998), in which the taking claims were dismissed as premature.

No such assurance exists in this case. It is a Fifth Amendment takings case and, for the first time, a federal court of appeals has held that the Eleventh Amendment bars such suits. Unless this Court grants this petition and reverses the decision of the lower courts, henceforth, "all property rights exist only at the whim of the sovereign." *Treasure Salvors*, 458 U.S. at 696.

CONCLUSION

The Pueblo respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Jan 6, 2000]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50656
Summary Calendar

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellant,

v.

STATE OF TEXAS,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-99-CV-98-P

Before REAVLEY, SMITH and DENNIS, Circuit Judges.

PER CURIAM:[1]

Ysleta del Sur Pueblo ("Pueblo"), an Indian Tribe, appeals the dismissal of its claims pursuant to F.R.C.P 12(b)(l). Because the district court erroneously granted dismissal with prejudice, we

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[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

modify the dismissal to render it without prejudice and affirm as modified.

A state may be subject to suit in federal court under two circumstances. One is waiver of immunity and the other is congressional abrogation of 11th Amendment immunity. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, (Florida Prepaid I)* 119 S. Ct. 2199, 2204-5 (1999). It is not contended that the State of Texas expressly consented to this lawsuit, and implied waiver under *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184, 84 S. Ct 1207 (1964) has been overruled. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, (Florida Prepaid II)* 119 S. Ct. 2219, 2228 (1999), Because there is no viable argument for express or implied waiver, Pueblo must establish abrogation under *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996).

Two tests must be satisfied for congressional abrogation of 11th Amendment immunity. The first is that Congress must unequivocally express its intent to abrogate State immunity. *Seminole Tribe*, 116 S. Ct. at 1114. The second is that the abrogation must be pursuant to a valid exercise of constitutional power. *Id.*

Pueblo argues that the Indian Non-Intercourse Act ("INA") abrogates State immunity. The act as amended in 1834 and now codified at 25 U.S.C. § 177, provides:

> No purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The

> agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

Neither this language nor the language of the prior versions meets the "unequivocally expressed intent" test. Even if a less stringent test were applied, this statute does not address state immunity at all and provides no basis to find congressional intent to abrogate immunity.

Furthermore, the INA was not passed under any constitutional power permitting abrogation of 11th Amendment immunity. Article I powers are not a valid source of congressional abrogation authority. *Seminole Tribe*, 116 S. Ct. 1132; *Florida Prepaid I*, 119 S. Ct. at 2205. Neither the Commerce Clause, the Indian Commerce Clause nor the War Powers Clause provides abrogation authority. Congress did not pass the INA pursuant to the 14th Amendment because the last amendment of the INA occurred before adoption of the 14th Amendment. Even if such a claim were credible, Congress must identify conduct transgressing the 14th Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct. *Florida Prepaid I*, 119 S. Ct. at 2207.

Pueblo alternatively contends that the self-executing remedy of the takings clause of the 5th Amendment provides independent abrogation by virtue of incorporation into the 14th Amendment. The 14th Amendment only provides Congress with power to enforce the Amendment through legislation, which provides the basis for congressional abrogation. Remedies against states under the 14th Amendment are created by legislation, not by other constitutional amendments.

This court has rejected 5th Amendment takings claims on 11th Amendment immunty grounds in two prior cases. *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1993); *McMurtray v. Holladay*, 11 F.3d 499, 505 (5th Cir. 1993). *First Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2386 (1987), was a state court action brought against a county in which the 11th Amendment was completely inapplicable, therefore it has no precedental effect on our application of state immunity in federal court.

The district court erroneously dismissed with prejudice for lack of jurisdiction. F.R.C.P. 41(b). *Alden v. Maine*, 119 S. Ct. 2240 (1999) may bar a state court action; However this question was never briefed, argued or decided in the district court and we will not consider matters raised for the first time on appeal. The only issue decided by the district court is that the 11th Amendment bars this claim against the State of Texas in federal court, which has no effect on claims Pueblo may bring in state court. Accordingly, the judgment of the district court is modified to be dismissal without prejudice.

AFFIRMED AS MODIFIED.

[Filed Jan. 6, 2000]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-50656
Summary Calendar

D.C. DOCKET NO. EP-99-CV-98-P

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellant,

v.

STATE OF TEXAS,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas, El Paso.

Before REAVLEY, SMITH and DENNIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed as modified.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: Jan. 28, 2000

APPENDIX B

[Filed Jul. 2, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil No. EP-99-CA-98-EP

YSLETA DEL SUR PUEBLO,

Plaintiff,

v.

STATE OF TEXAS,

Defendant.

ORDER

On this date the Court considered the defendant's motion to dismiss, filed May 5, 1999, the plaintiff's response, filed May 17, 1999, and the defendant's reply, filed June 4, 1999 in the above-styled and numbered cause. After careful consideration the Court is of the opinion that the motion should be granted.

FACTUAL BACKGROUND

An Indian Tribe, Ysleta del Sur Pueblo, has sued the State of Texas for four billion dollars ($4,000,000,000), claiming an unconstitutional taking of the land by the State. The Tribe has invoked this court's jurisdiction pursuant to 28 U.S.C. §§1331 and 1362; the Indian Non-Intercourse Act, codified at 25 U.S.C. §177; the Fifth and the Fourteenth Amendments; the Treaty of Guadalupe Hidalgo, 9 Stat. 922; and federal Indian common law. The State has filed a motion seeking to dismiss this action pursuant to Rules 12(b) (1) and 12(b) (6). The State claims that

under the Eleventh Amendment it is immune from suit by its own Citizens in the federal court.

ANALYSIS

The Eleventh Amendment state: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Supreme Court, in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), broadened the States' Eleventh Amendment immunity in federal courts and interpreted the Amendment in such a way as to also make States immune from federal suits by their own citizens. However, the immunity of the states may be circumvented in certain instances. In the present case, the immunity may be averted if either the State has consented to the suit or if Congress, in express and unequivocal language and under proper constitutional authority, has abrogated the State's Eleventh Amendment immunity. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54-56, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Since the State of Texas has clearly not consented to the suit, the only exception that may apply in this case is the abrogation exception. We will now analyze whether Congress has abrogated Texas' Eleventh Amendment immunity either in the Indian Non-Intercourse Act, or under the Fifth and the Fourteenth Amendments of the Constitution.

In *Dellmuth v. Muth*, 493 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989), the Supreme Court set forth a standard for congressional abrogation of Eleventh Amendment immunity. The court explained that Congress' intent to abrogate must be "unmistakably clear" and plainly stated "in the language of the statute." *Id.* at 227-228. The Tribe is asking us to extend our jurisdiction over this case because the Indian Non-Intercourse Act involves a federal question and under §1331 it must be heard in a federal court. However, as the State contends, the Eleventh Amendment gives Texas immunity from suit by its

own citizens in the federal court; therefore, unless Congress has abrogated the State's immunity by clearly stating its intent in the language of the Indian Non-Intercourse Act, the Tribe may not sue the State in federal court. *Id.*

A study of the text of the Indian Non-Intercourse Act ("INA") reveals that Congress did not abrogate the State's immunity in the Act. There is no language in the Act which expressly, or even impliedly, abrogates the State's Eleventh Amendment immunity. *See* Indian Trade and Intercourse Acts, Act of June 30, 1834, ch. 161, §12, 4 Stat. 730, codified at 25 U.S.C. §177.

The Tribe contends that since the States' immunity from suit by their own citizens was not inferred from the Eleventh Amendment until about a hundred years after the Indian Non-Intercourse Act was enacted, Congress could not have foreseen this later interpretation of the Eleventh Amendment and thus did not provide for the abrogation of immunity in the language of the statute. Hence, since the INA predated the Eleventh Amendment, the Tribe is asking us to relax the express language requirement. However, the Supreme Court has stated that abrogation must be unequivocally stated in the language of the Act. *See Dellmuth*, 491 U.S. at 227. The Indian Non-Intercourse Act does not contain such unequivocal language. The Tribe is asking us to ease this unequivocal language requirement and yet cites no authority where the express language requirement was relaxed because the statute pre-dated the Constitutional Amendment. The Supreme Court has made it clear that unless abrogation is clearly stated in the statute, it will not suffice to abrogate the Eleventh Amendment immunity. *See id.* Therefore, the Indian Non-Intercourse Act does not provide the sufficient basis for abrogation of the States' immunity.

Furthermore, arguing in the alternative, the Tribe claims that although Congress did not expressly abrogate the States' immunity in the Indian Non-Intercourse Act, it did intend to hold the States liable to the Indians and to abrogate their immunity. Con-

trary to the Tribe's contentions, Congress in the passage of the INA did not seem to have contemplated States' liability to the Indian Tribes and it also did not intend to abrogate the States' sovereign immunity. Neither the language nor the history of the Indian Non-Intercourse Act reflects Congress' intent to impose liability and to abrogate the States' immunity. The original version of the Act did mention the States, but it was only to declare that the sale of Indian land without the authorization of the federal government "to any person, or persons, or any State" was invalid. *See* Indian Trade and Intercourse Acts, Act of July, 1790, ch.33, 1 Stat. 137 . Clearly, this language does not impose liability nor does it abrogate the States' immunity. Similarly, the current text of the INA does not allude to the liability of the States. The only instance the word "State" is mentioned in the Act, it is in reference to "agent of any State" and "land within such State" and not the State as an entity. See 25 U.S.C. §177. As for abrogating immunity, the current version of the INA contains no language abrogating the States' sovereign immunity. *See id.* The INA states that every "person" who, without the authority of the United States government, negotiates for the title or purchase of the Indian land, is liable to a penalty of $1000.00. *Id.* Thus, the INA imposes a penalty on a "person," and not on a "State" for unlawful conveyance of Indian land. Accordingly, neither the original version nor the current version of the Act give any indication that Congress intended to make the States liable to the Indians or to abrogate the States' sovereign immunity.

Moreover, if Congress had intended to make the States liable and to abrogate their immunity, it could have either expressly stated that in the text of the INA or it could have later amended the Act to reflect its intent. However, although the Act has been amended several times since its original passage, none of the amended versions contains any language which indicates Congress's intent to hold the States liable to the Indians or to abrogate the States' immunity. Even after the *Hans* decision, where

the Supreme Court broadened the scope of the Eleventh Amendment to also grant States immunity from suit by their own citizens, Congress still did not amend the INA to expressly provide for abrogation of the States' Eleventh Amendment immunity. As the State of Texas pointed out, although Congress has amended other statutes to adhere to the unequivocal language requirement, it did not do so with the INA. *See e.g., College Sav. Bank v. Florida Prepaid Post Secondary Educ. Expense Bd.*, 131 F.3d 353, 357-58 (3rd Cir. 1997). The INA was last amended in 1834 and has remained unchanged since that time. Congress' inaction in amending the Act refutes the Tribe's argument that Congress contemplated the liability of the States and intended to abrogate their sovereign immunity. Since the Indian Non-Intercourse Act does not implicitly abrogate the States' immunity, it fails to meet the first requirement of the abrogation test set forth in *Seminole*. Accordingly, the Eleventh Amendment prohibits this court from asserting jurisdiction over this claim based on the INA.

The second prong of the abrogation test requires that Congress pass the statute giving rise to the abrogation claim, pursuant to a constitutional power authorizing such abrogation. *See Seminole* at 54-56. The INA also fails to meet the second requirement. In *Seminole*, the Supreme Court explained that the Fourteenth Amendment was the only constitutional provision granting Congress the power to abrogate. *See id.* at 59. The Tribe asserts that the INA was passed pursuant to the Article I, War Powers Clause, and the Fourteenth Amendment of the Constitution. Neither of these provisions are valid Constitutional powers allowing Congress to abrogate the States' immunity. The Supreme Court has held that Congress cannot use Article I power to abrogate the States' immunity. *See id.* at 72-73. Similarly, the Fourteenth Amendment cannot be used to abrogate the States' immunity in the present case. The Fourteenth Amendment was not ratified until 1868, several decades after the last Amendment to the INA in 1834; thus, Congress did not

have abrogation powers under the Fourteenth Amendment at the time of the enactment and amendment of the INA. Therefore, since the INA was not passed pursuant to a constitutional power which would grant Congress the authority to abrogate the States' immunity, it fails the second prong of the abrogation test set forth in *Seminole*.

The Tribe also asserts that this court can exercise jurisdiction over the State based on the Taking Clause of the Fifth Amendment and §5 of the Fourteenth Amendment. The Tribe reasons that the Taking Clause of the Fifth Amendment is self-executing and the United States is not immune from suits brought under that provision, and it cites *First Lutheran Church. v. Los Angeles County*, 482 U.S. 304, 314-16, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987), as its authority. The Tribe then contends that §5 of the Fourteenth Amendment applies the Taking Clause of the Fifth Amendment and its waiver of sovereign immunity to the States. The Tribe insists that just as the United States government has no defense of sovereign immunity in suits arising under the Taking Clause of the Fifth Amendment, the States, also, have no immunity in suits arising under the Taking Clause or the Fifth Amendment as applied to the States by the Fourteenth Amendment. The Tribe has cited no authority that has held and applied this position. Additionally, in a "taking" action brought under the Fifth Amendment, the Fifth Circuit held that the former employees' claims for monetary remuneration was barred by the Eleventh Amendment. *See McMurtray v. Holladay*, 11 F.3d 499, 504-05 (5th Cir. 1993). Consequently, since the Tribe has cited no authority supporting its position that under the Fifth and the Fourteenth Amendment States' immunity is abrogated, we will follow the Fifth Circuit's ruling and hold that in this case the Tribe's Fifth and Fourteenth Amendment claims against the State are barred by the Eleventh Amendment.

The Tribe has also invoked this court's jurisdiction based on 28 U.S.C. §§1362 and §1331. As the Supreme Court has stated, §1362 does not abrogate the State's Eleventh Amendment im-

munity because it does not contain language which clearly reflects Congress' intent to do so. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 111 S. Ct. 2578, 115 L.Ed.2d 686 (1991). The Supreme Court has further explained that neither §1362 nor §1331 contain language which reflects a plain and clear congressional intent to abrogate the States' Eleventh Amendment immunity in all cases. *See id.* Thus, the States' Eleventh Amendment immunity prevents this court from exercising jurisdiction over this case pursuant §1362 and §1331.

Additionally, the Tribe claims there is federal jurisdiction over this case based on the Treaty of Guadalupe Hidalgo, 9 Stat. 922, and the federal Indian common law. As previously stated, the States are immune from federal suits by their own citizens unless Congress has abrogated the States' Eleventh Amendment immunity. *See Dellmuth*, 491 U.S. at 227-228. The Tribe has cited no authority holding that there is congressional abrogation under the Treaty of Guadalupe Hidalgo or the federal Indian common law. Absent congressional abrogation in either the Treaty of Guadalupe Hidalgo or federal Indian common law, Texas has Eleventh Amendment immunity.

CONCLUSION

For the reasons discussed above, this action is barred by the Eleventh Amendment. This court cannot exercise jurisdiction over this claim.

Accordingly, it is hereby ORDERED that the State of Texas' Motion to Dismiss pursuant to Rule 12(b)(1) is GRANTED and this case is DISMISSED.

SIGNED and ENTERED this 30th, of June 1999

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge

[Filed Jul.2, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil No. EP-99-CA-98-EP

YSLETA DEL SUR PUEBLO,

Plaintiff,

v.

STATE OF TEXAS,

Defendant.

JUDGMENT

On this date the Court considered the judgment to be entered in the above-styled and numbered cause. Consistent with the Order filed in this cause on this same date, it is hereby ORDERED, ADJUDGED and DECREED this case is DISMISSED WITH PREJUDICE.

SIGNED and ENTERED this 30th day of June, 1999.

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge